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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 131 2

HENRY C. HUBBARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 16th, 1970 in the above styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported but is appended hereto (pages 1A-4A). The opinion of the United States District Court for the Eastern District of Virginia is reported in 255 Fed. Rpt. 2d 324, and the portion thereof relating to this respondent is contained in the Appendix printed for the use of the court below, ten copies of which are filed with this court with this Petition. (Ap. 11-20)*

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is November 19th, 1970. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 USC 1254, 28 USC 1346(b) and 28 USC 2671.

QUESTION PRESENTED FOR REVIEW

Has the Court of Appeals sanctioned a gross abuse of discretion by the trial court in finding for the defendant (Respondent here), when every reasonable intendment of fact favored plaintiff's claim that his injuries resulted from the negligence of agents and employees of defendant, United States of America? The ends of justice call for the exercise by this Court of its power of supervision, because the judgments entered below are clearly erroneous.

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*In this Petition "Ap." refers to the Appendix printed for the use of the United States Court of Appeals for the Fourth Circuit.

"Tr." refers to the Transcript of the testimony in the trial court.

"pp" refers to the appendix that is a part of this petition.

STATEMENT OF THE CASE

Petitioner, Henry C. Hubbard, was one of twenty persons invited by the United States Army to participate in a supervised deer hunt at Camp A. P. Hill, Virginia, on November 30th and December 1, 1964. The letter of invitation (App. 32-34) outlined the rules and procedures adopted by the Army for the conduct of supervised deer hunts, and specifically directed all invitees to arrive at the Camp prior to dusk on the evening of November 29th, 1964, and paragraph 2(d) of the letter sets out the purpose as follows:

> "2(d) An element of the Post Hunting Section will brief us at the Lodge at 2000 hours on the evening prior to the first day of the hunt. They will also issue post hunting permits, temporary vehicle registration and public liability waivers, (par 2c, Inclosure 2), where necessary. Inasmuch as all processing will be conducted at the Lodge, you may go directly there."

As alleged in the Complaint (App. 4) and admitted by the defendant in its Answer (App. 9) the briefing of the hunting party the evening before the first day of the hunt was the established rule, custom and policy of the Army designed to avoid the danger of injury to the invited hunters. However, by permission of Major John F. Christensen, the Army's Congressional Liaison Officer, three of the invitees did not report to Camp A. P. Hill the evening of November 29th for processing and briefing, namely, Congressman Ellis G. Cuns, Congressman Albert H. Quie, and a Mr. McNichol (App. 27). They arrived at Camp A. P. Hill about 6:30 a.m. on the morning of No-

vember 30th (Ap. 33) when the rest of the hunting party were up, out and ready to take off for the first drive.

Upon arrival these three late-comers were taken to the PX snack bar (Ap. 44), had coffee, were issued post hunting permits, temporary vehicle registration, and executed public liability waivers, and informed that the hunting party would be divided into two teams, one of drivers and the other of standers, and were cautioned that when any driver came within sight of a stander, the stander should cry out "cease fire" and this admonition should be repeated down the line (Ap. 66). Lt. Martin, the officer in charge of the Post Hunting Section, testified that he drew a sketch on a piece of paper for Messrs. Conte, Quie and Mr. McFarland similar to the one he drew on the blackboard the night before for the 17 other hunters showing a horseshoe formation for the standers (Ap. 44-71).

This was categorically denied by Congressman Quie (Ap. 67) and by Congressman Conte (Ap. 37-40), each of whom denied being informed that standers would be placed other than in an approximately straight line, nor did they have any reason to know that other standers would be placed in a perpendicular line in front of them.

Two drives, each in a different area of the forest, were conducted on the morning of November 30th. Congressman Conte and plaintiff Hubbard were drivers on each of them. Conte testified that he was approximately in the center of the line of drivers—consisting of ten hunters—and two members of the Hunting Section on these hunts (Tr. 85). After lunch, served in the field, the hunting party moved to the area selected for the first drive of the afternoon in which Hubbard and Conte be-

same standers, Hubbard in the group in charge of Corporal Sleeman and Conte in the group in the charge of Sergeant Traynor (Ap. 36-47). A photograph of the formation of the standers for this drive is shown on page 71 of the Appendix used in the court below and there is an explanation of it in the Stipulation on pages 68 and 69. During this drive two deer run between Hubbard and Conte and Conte fired at about a 45 degree angle to his right front, missing the deer, but the shot struck Hubbard over the right eye, penetrating his skull and lodging in his brain.

The fact that one of the invited hunters had been shot caused considerable consternation and concern at the Camp and a reconstruction of the hunt was ordered immediately and conducted on the evening of November 30th and the morning of December 1st (Ap. 37 & 67).

Because of conflicting statements by Congressman Conte on the one hand and personnel of the Army on the other, this action was brought against the United States of America (28 USC 1346(b)) and Silvio O. Conte in separate counts of the one complaint (Ap. 3). Petitioner was required to try the case against both defendants at one trial. Conte demanded a jury, and the District Court heard the case as to the United States.

The jury found Congressman Conte not guilty of negligence and judgment was entered on that verdict on January 31, 1968. The District Court found the United States of America not guilty of negligence and entered its order dismissing Hubbard's claim on March 10th, 1969. The appeal to the Court of Appeals was dismissed by consent of all parties as to Congressman Conte.

ARGUMENT

Hubbard based his claim against the United States primarily on two separate and distinct acts of negligence:

(a) Excusing Congressman Conte and two other invitees from reporting on the evening of November 29th, 1964, for processing and the briefing as prescribed by the established rules, procedures and practices for supervised deer hunts in effect at Camp A. P. Hill at the time in question, and

(b) The failure of Sergeant Martin F. Trayner, a member of the Post Hunting Section, to point out to Congressman Conte the area where the flankers (including Hubbard) would be placed by Corporal Sleeman to his right front, as the Sergeant was instructed to do by the same rules, procedures and practices (Ap. 45).

When Major Christensen excused Conte, Quie and McFarland from reporting at Camp A. P. Hill the evening before the first day of the hunt, contrary to established rules, he was guilty of actionable negligence attributable to defendant, United States of America. *U. S. vs. Shiveley*, 345 Fed.2nd 294. One look at the formation of the standers for the drive in which Hubbard was shot, as shown on the right side of the photograph (Ap. 71) certainly should convince any reasonable, fair-minded person that it was imperative every participant in the hunt should have had a thorough understanding of the unusual "flanker" formation used at Camp A. P. Hill. The time and place to have acquired this understanding was at the briefing of the entire hunting party on the evening of November 29th as directed by the established rules and

It was palpable error to conclude that the foregoing proven and established act of negligence could be avoided by the hurried, controverted processing conducted in a few minutes at the PX the following morning when everyone else in the party was ready and impatient to get into the woods.

The jury of twelve men and women that heard the same testimony at the same time with the trial judge decided that Congressman Conte was not at fault. They obviously did not believe that he had been adequately informed of the unusual stander formation, nor did they believe there was any evidence to indicate that he should have known by observation on previous drives conducted in various areas of the heavily wooded forest, he being in the middle of a quarter-mile line of drivers consisting of ten hunters and two army men 40 to 50 yards apart. (Tr. 85) The trial judge found that Congressman Conte had been adequately briefed at the hurried and controverted conversation he had with Lt. Martin and uses this finding to avoid the admitted violation of the established rules that required attendance at the Lodge the night before. Proven negligence is excused by a "maybe." If Conte had attended that meeting, Hubbard, it is fair to say, would not have been shot, and we would not be involved with this litigation. Why the trial judge felt free to ignore the judgment of the twelve jurors on the facts in this case is difficult to comprehend. It was an unwarranted abuse of judicial discretion and worse still, by an unreasonably rigid interpretation of Rule 52(a), Fed. R. Civ P., this arbitrary decision of the trial court was sanctioned by the Court of Appeals.

It was further alleged in Hubbard's complaint and proven in the trial, that it was the duty of members of

the Post Hunting Section when placing hunters, to point out other hunters to their right or left. (Ap. 3, 45). This rule and procedure was separate and distinct from all other instructions they had received. Mr. Conte testified that neither Sergeant Trayner nor anyone else ever informed him that standers would be placed in front of him on a line perpendicular to the main line of standers on which he was first hunter placed in the drive in which Hubbard was shot (Ap. 37). Sergeant Trayner testified he "couldn't say" that he pointed out to Conte other hunters to his right and left when he placed him (Ap. 56). He admitted that he had been instructed to do so (Ap. 54) but apparently did not consider a failure to do so particularly significant when he added "This was an obligation put out to him, as well as to me." (Ap. 54) Trayner obviously thought Conte had attended the briefing the night before the hunt. Yet, the Court of Appeals has held that "the factual determination that Conte had been informed as to where standing hunters were to be stationed * * * is dispositive of Hubbard's claim of negligence because of Sergeant Trayner's alleged failure to point out to Conte * * * the spot where Hubbard was stationed." (pp. 4A, 5A) This is a blunderbuss disposition of Hubbard's claims.

Both Courts below stressed with great emphasis the dangers involved for anyone going on a hunting trip, even to the point that Hubbard was guilty of contributory negligence merely because he accepted the invitation to join the hunting party (Ap. 20, pp. 3A). Whatever risks Hubbard assumed by joining the hunting party, he certainly did not assume the risk of the Army's negligence; he had a right to expect the Army would abide by its own rules and regulations. On the other hand, however, the lower courts did not consider that these stressed hazards required

any particular care for the protection of the invited guests by their hosts; their decisions even countermand abandonment of established regulations.

The deer hunt for November 30th and December 1, 1964 was carefully organized and carefully conducted, and the Army knows it. They do not put standers out like that any more (Ap. 45, 48). Hubbard's unfortunate experience has at least accomplished that much.

The trial judge, obviously somewhat dubious about its finding that Hubbard had failed to prove negligence on the part of the United States, then changes tack and charges that Hubbard was guilty of contributory negligence. We challenge anyone to point out in the record of this case any act or omission on the part of Henry C. Hubbard that could legally deny him relief because of his own contributory negligence. He was stationed on the right flank of the main line of standers by Corporal Sleeman. He sat there and he stood there on that spot. He did not move from it. He did not shoot (Ap. 51). This type of hunt required all standers to be very quiet. He had a right to expect that all standers on the main line knew of the area in which flankers were placed. If he had moved from his assigned position he then would have been on his own and in the event of a mishap, we may be sure the government would claim it his own fault; but he did not move and he was hit by Conte's shot because, as the jury found, Conte did not know other hunters would be placed where Hubbard was.

We respectfully submit that the trial court grossly abused its judicial discretion in exonerating the United States of America from liability for the careless, negligent

and reckless manner in which this particular hunt was organized and conducted, and it was error for the Court of Appeals to sanction it. The Court of Appeals apparently thought all three hunts of that day were conducted over the same area (pp. 3A, 4A).

Surely no one could seriously think the trial court made its decision on the basis of a credibility determination as between Lt. Martin, who was in charge of the Post Hunting Section, on the one hand, and Congressmen Quie and Conte on the other. The comments of the District Judge throughout the trial indicate his conviction that anyone who goes hunting is definitely lacking in good judgment, and if he suffers an injury, it is his own fault since he should have stayed at home in the first place. The Court of Appeals apparently considered it a credibility decision, in other words, that the trial court did not believe the testimony of Congressmen Conte and Quie, but did believe Lt. Martin, head of the Post Hunting Section, who understandably could have been quite disturbed if not scared, in view of the reaction of the authorities at Camp A. P. Hill when learning Hubbard was shot.

This Court has the inherent power to supervise the judicial proceedings of the Courts below. We sincerely believe that the findings of the district court as sanctioned by the Court of Appeals in this case are clearly erroneous and should be reviewed.

Rice vs U.S. 179 Fed 2nd 26,
U.S. vs U.S. Gypsum Co 68 S.Ct. 525

U.S. vs Oregon State Medical School 343 U.S. 326, 72 S.Ct. 694, 99 L.Ed. 978

McAllister vs U.S. 348 U.S. 19; 75 S.Ct. 6; 99 L.Ed. 20

It would be most disillusioning indeed if it should develop that a respected citizen of this country could be whipsawed in our Federal Courts as Henry C. Hubbard most assuredly has been so far in this case.

There remains another highly important issue in this litigation, which neither of the courts below have considered nor decided, the effectiveness of the Release signed by each of the invitees in Virginia, an actual photograph of which appears on page 72 of the Appendix. The government contended that this Release should be construed under Federal laws and petitioner claims Virginia law controls. There is a conflict among Circuit Court decisions on this question. It should be resolved. Petitioner proposes to present and argue the issue should a writ of certiorari be allowed.

CONCLUSION

The United States Court of Appeals for the Fourth Circuit has sanctioned an arbitrary abuse of discretion by the United States District Court for the Eastern District of Virginia, which should be reviewed and reversed by this Court.

Respectfully submitted,

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Alexandria, Virginia
February 4th, 1971.

In the

United States Court of Appeals

for the Fourth Circuit

No. 13,620

HENRY C. HUBBARD,

Appellant,

versus

UNITED STATES OF AMERICA,
and SILVIO O. CONTE,

Appellees.

Decided November 10, 1970.)

BOREMAN, Circuit Judge:

Henry C. Hubbard brought an action against the United States, under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and against Silvio Conte, the latter a member of Congress, for damages resulting from injuries sustained by Hubbard as a result of having been shot in the hand by Conte during an organized and supervised deer hunt on a government reservation at Camp A. P. Hill, Virginia, to which Hubbard, Conte and some eighteen

other persons had been invited as guests of the United States Army. Negligence of the United States was charged in the first count of the complaint, and negligence of Conte was charged in the second count. Both counts of the complaint were heard together, before a jury as to defendant Conte and by the court as to the United States. The jury returned a verdict in favor of Conte and the court entered judgment in favor of the United States. Hubbard's appeal as to Conte was dismissed by consent and Hubbard prosecutes this appeal from the judgment in favor of the United States. We affirm.

The district court dismissed Hubbard's claim against the United States on the ground that Hubbard failed to prove that the Army was negligent in failing to discharge its duty to exercise reasonable care in selecting the place for, and in conducting, the hunt; further, even assuming that the Army was negligent, the Government would not be liable to Hubbard since he had been contributorily negligent and had assumed the risk of injury when he voluntarily joined the hunt.

At such deer hunts at Camp A. P. Hill, hunters were customarily divided into two groups, *i.e.*, drivers and standers. The standers were placed in stationary positions, and the drivers while making noise moved in a straight line toward the standers from some distance away, hoping to cause any deer in the area to run toward the standers. On the day of Hubbard's injury the standers were positioned in a "u"-shaped alignment, with the drivers moving in a straight line toward the open end of the "u." The two groups customarily exchanged duties during the hunting day so that all of the hunters would share time as drivers and as standers. Hubbard was injured during an afternoon hunt. Both Hubbard and Conte had been drivers at

the morning hunt, during which they should have become familiar with the terrain and should have seen how and where the hunt was conducted and where the standers were positioned.

In deciding that Hubbard had not sustained his burden of proving negligence on the part of the United States, the court necessarily was required to make a vital credibility resolution. There were irreconcilable conflicts in the evidence. Hubbard claimed that the United States had been negligent in excusing Conte and two other members of the hunting party from a briefing session which had been conducted by the Army for all other members of the party on the night before the hunt; and, that a briefing session conducted for these three members of the hunting party in the early morning of the day of the hunt had been quite brief and inadequate to inform these three persons as to the positioning of hunters during the hunt, which negligence was the proximate cause of Hubbard's injuries.

Lieutenant Martin testified that he had conducted a full briefing for these three hunters on the morning of the hunt and that he had drawn a rough diagram for them showing approximately where the hunters would be stationed, the area through which the deer would be driven, and the approximate firing pattern to be followed and observed by the various hunters. Conte and his companion, another of the three hunters who had been briefed by Lieutenant Martin on the morning of the hunt, denied that Martin had drawn a diagram of the hunt site to indicate where hunters would be stationed or the approximate firing pattern.

Hubbard recognizes that the standard of review of a trial court's factual determination is the "clearly erroneous" test, as set out in Rule 52(a), Fed.R.Civ.P., which states in pertinent part:

> "• • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. • • •"

As held in *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The district court resolved the conflict in the evidence by crediting Lieutenant Martin's testimony and we cannot say that this factual finding was clearly erroneous.

The resolution of this credibility issue controls the resolution of Hubbard's claim that it was negligence to excuse Conte and two others from the briefing held on the night before the hunt. The district court found that a full and adequate briefing with diagrams was given to Conte and the two others on the morning of, and prior to, the hunt; thus, the time when the briefing occurred is of no significance.

The factual determination that Conte had been fully informed as to where the standing hunters were to be stationed and as to the approximate firing pattern, which

finding we accept, is dispositive of Hubbard's claim of negligence because of Sergeant Trayner's alleged failure to point out to Conte on the premises the exact spot where Hubbard was stationed[1] and his claim of negligence because he was placed within range of Conte's gun. Conte knew or should have known that one of the hunters would be stationed where Hubbard was in fact injured and that he should not fire in the direction of that station.

Our conclusion that the district court did not err in holding that Hubbard had not sustained his burden of proving actionable negligence on the part of the United States makes it unnecessary to discuss other issues which Hubbard raises on appeal.

Affirmed.

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[1]The district court did not explicitly find that Sergeant Trayner had advised Conte of Hubbard's specific location but the court did conclude that Hubbard's claim that Conte had not been so advised was not supported by the evidence.